UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SHIRLEY KIRKPATRICK, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C02-4027-PAZ **MEMORANDUM OPINION AND ORDER**

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I. INTRODUCTION

The plaintiff Shirley Kirkpatrick ("Kirkpatrick") appeals a decision by an administrative law judge ("ALJ") denying her Title II disability insurance ("DI") benefits and Title XVI supplemental security income ("SSI") benefits. Kirkpatrick argues the ALJ erred in (1) making determinations concerning Kirkpatrick's residual functional capacity that were not supported by substantial evidence; (2) improperly weighing the evidence submitted by treating, consulting, and non-examining physicians; (3) making unfair and inappropriate credibility assessments; and (4) failing to pose an appropriate hypothetical question to the vocational expert. Kirkpatrick argues that because of these errors, the Record does not contain substantial evidence to support the ALJ's decision denying her claim for benefits. (*See* Doc. No. 9)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On May 1, 1996, Kirkpatrick filed an application for SSI benefits. (R. 331-32) The claim was denied on January 2, 1997 (R. 88-92, 336), and no request for reconsideration was filed.

Kirkpatrick filed applications for both DI and SSI benefits on October 24, 1997, alleging a disability onset date of March 29, 1996,[1] due to fibromyalgia, back problems, memory problems, vision problems, depression, and status post left peritoneal craniotomy and removal of a meningioma. (R. 120-22, 333-35) The applications were denied on April 9, 1998. (R. 86, 93-97, 337) On April 28, 1998, Kirkpatrick requested reconsideration (R. 98), but her request was denied. (R. 87, 99-103, 338)

On December 11, 1998, Kirkpatrick requested a hearing (R. 104), and a hearing was held before ALJ Jan E. Dutton in Sioux City, Iowa, on September 13, 1999. (R. 41-85)

[1] Amended to April 1, 1996, at the hearing before the ALJ. (R. 43-44)

Non-attorney Robert Johnson represented Kirkpatrick at the hearing. Kirkpatrick testified at the hearing, as did Vocational Expert ("VE") Sandra Trudeau. At the commencement of the hearing, Kirkpatrick's representative clarified that her claim was for a closed period from April 1, 1996, to May 31, 1999, because Kirkpatrick had returned to full-time employment as a legal secretary on June 4, 1999. (R. 49, 59, 189)

On October 26, 1999, the ALJ ruled Kirkpatrick was not entitled to benefits. (R. 23-35) On November 2, 1999, Kirkpatrick requested review by the Appeals Council (R. 19), and on February 13, 2002, the Appeals Council denied Kirkpatrick's request (R. 7), making the ALJ's decision the final decision of the Commissioner.

Kirkpatrick filed a timely Complaint in this court on April 15, 2002, seeking judicial review of the ALJ's ruling. (Doc. No. 1) On May 6, 2002, the parties consented to jurisdiction by the undersigned United States Magistrate Judge, and Chief Judge Mark W. Bennett transferred the case to the undersigned. (Doc. No. 4) Kirkpatrick filed a brief supporting her claim on August 26, 2002. (Doc. No. 9) On October 4, 2002, the Commissioner filed a responsive brief. (Doc. No. 12) The court now deems the matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Kirkpatrick's claim for benefits.

B. Factual Background

1. Introductory facts and Kirkpatrick's daily activities

At the time of the hearing, Kirkpatrick was 54 years old, and living in an apartment in the vicinity of Kansas City, Missouri, where she was working as a legal secretary. (R. 50-51) She also owned a trailer in Ida Grove, Iowa, where she traveled every second or third weekend, because "it's home." (R. 50, 67) She has been single and living alone since 1990. (R. 62)

In 1965, Kirkpatrick received a GED, and then in the early 1990s, she obtained an A.A. degree and a paralegal certificate. (R. 51) Since 1969, she has worked primarily in

the legal field as a legal secretary, paralegal, office manager, bookkeeper, and personnel director. (*Id.*)

In April 1996, while living in California, Kirkpatrick learned she had a tumor growing around her spinal column and around the arteries leading to her brain. (R. 52) She quit her job and returned to Iowa to have the problem corrected. (R. 52-53) In June 1996, she had surgery, and then, because of complications, she was hospitalized for seven weeks.[2] (*Id*). After she was released from the hospital, she returned to her surgeon for a final examination, and when she complained of continuing pain, he advised her that her pain was being caused by fibromyalgia. (R. 54) About a year after the surgery, he performed another surgery to insert a shunt to treat hydrocephalus. (R. 55) He never released her to return to work. (*Id.*)

After April 1996, Kirkpatrick did not work at all until the fall of 1997, when she began watching three of her grandchildren after school. (R. 77-78) In early 1998, she also began babysitting on a part-time basis for her newborn grandson. (R. 56-57, 59-60, 77-78) After three or four months, she quit this job because her grandson was too heavy, and her arms would become numb and fall asleep. (R. 56, 60) She next worked at a bakery, where she worked three or four hours a day, five days a week and every other Saturday. (R. 55-56) She held this job for about nine months. (R. 55) In the fall of 1998, she started working as a disc jockey on the weekends at "Skate Palace."[3] (R. 57-59) In this job, she sat on a stool and played music for about two hours at a time. (R. 57) The disc jockey job was seasonal employment, and Kirkpatrick worked there from September through November of 1998, and from January through May of 1999. (R. 57-59) She was unable to seek treatment

[2]A few days after the surgery, her doctor had to perform a follow-up surgery to place a balloon in one of her veins. (R. 55)

[3]For some period of time, she worked at both the bakery job and the disc jockey job. (R. 59)

for her medical problems throughout this time period because she did not have insurance or money to pay for treatment. (R. 60-61)

Upon questioning by the ALJ, Kirkpatrick at first denied she had ever ridden a bicycle outside or on a bike trail, stating she had tried to ride a stationery bicycle but quit because of the pain. (R. 61) However, later in her testimony Kirkpatrick stated, "Just a couple of times that I tried the local trail and it's 4 miles long and I tried it a couple times to see if I could do it but it would take an hour and a half to 2 hours and I would be really hurting when I got done." (R. 62)

Beginning June 4, 1999, Kirkpatrick started the full-time position as a legal secretary in Kansas City. (R. 65)

Kirkpatrick testified she does whatever housekeeping gets done in her home. (R. 62) She does the dishes, but only about five minutes at a time, because she has to sit down and put her feet up or do something else. (R. 70) During her period of claimed disability, she could not watch television, read a book, or sew because of pain in her back and double vision. (R. 71)

In a disability report prepared on October 24, 1997 (R. 140-45), Kirkpatrick stated she was unable to work after March 31, 1996, because of the following problems:

> unable to sit, stand, bend, even sleep in one position for any length of time; lifting or opening things minimal; hands swell; no longer able to do little things; muscles and joints, plus neck and back areas consistently ache and/or sharp pains, including stomach area; feet bottoms hurt sometimes, unable to walk on them.

(R. 140) She also stated her "exercise and aerobics are being set to increase slightly to help with fibromyalgia, but limits lifting and bending." (R. 143) She stated she could do a little household maintenance daily, "but bending, lifting, even doing dishes require breaks, and things sometimes don't get done without help." (*Id.*) She described her hobbies as reading and sewing, but said "even these are limited due to the inability to sit or even lay in a

position for a lengthy time." (*Id.*) She visited briefly with relatives a couple of times a week. (*Id.*) She could drive a car for a couple of hours at a time without resting, where previously she could drive as long as 36 hours at a time when she would come to Iowa from California to visit relatives. (*Id.*)

In a supplemental disability report dated November 5, 1997 (R. 156-58), Kirkpatrick stated she visited with her family "once in awhile," for between five to thirty minutes at a time. (R. 156) She cooked one meal a day. (*Id.*) She did the following chores: "wash dishes in morning, laundry when needed, clean house maybe once a week, vacuum and dust accordingly – all with breaks and rest in between." (*Id.*) She also mowed the lawn, swept the porch and sidewalk, and did some gardening, "about 10 days apart with breaks and rest." (R. 157) She shopped and did errands once a week. (*Id.*) She did minimal gardening, and sewed, read, and played cards and bingo. (*Id.*) Since the surgery, she had a decreased energy level, and was less able to sit or stand for long periods, lift or move things, or drive longer distances. (R. 158) She also had a quicker temper. (*Id.*)

In a "Personal Pain/Fatigue Questionnaire" completed on November 19, 1997 (R. 159-62), Kirkpatrick described her pain as follows:

> all of body affected; i.e., neck and back usually dull ache, behind right ear, neck, right shoulder and hip area, sharp pains with aches, deep hip/butt area down legs, bottom heel area of feet hard to walk; arms, elbow joints ache.

(R. 159) She stated her pain was increased by cold weather and by sitting, standing, or laying down for periods of time. (*Id.*) Her pain sometimes lasted all day, but at other times was intermittent during the day. (*Id.*) She did not take any medication for the pain because she had no money or medical insurance. (R. 160) She stated the pain affected her ability to think, concentrate, and remember things. (R. 161) She also stated her pain limited her ability to walk, stand, or sit as follows:

> Walking continuously (i.e. trail) I can walk about 1 1/2 hrs, sitting or driving about 2 hrs, standing or bending about

> 5 minutes; even sleeping at night, position has to be changed at least 3 times.

(R. 162)

She described her typical day as follows:

> if back hurts when awaken, I'll stay in bed a little longer, may fall back asleep for 3-4 hours more, get up feed kitties and fix a cappuccino and/or breakfast, make bed; try to do whatever needs to be done, go through and organize things from unpacked boxes, sew, strip paint, go through clothes, catch up on homework which is way behind, check mail once a week, maybe, get fruit and groc (no money for general shopping)[,] check news, listen to tape for walk exercise, granddaughters get off bus after school, take to their house or stay here, games, talk, mother picks them up 6 pm., return home, fix dinner, listen to news, possible movie, bath, curlers in hair, bed.

(*Id.*)

In a statement Kirkpatrick provided to a Social Security representative on March 25, 1999 (R. 173-78), she reported she was attempting to work, but was not able to work standing or sitting "because of numbness of feet, hands, neck, and back pain." (R. 173) She stated her hands were numb and swollen every morning, with no feeling in her fingers. (*Id.*) She was unable to do housework, and sometimes was even unable to slice a piece of bread or hold a cup of coffee. (*Id.*) Her feet and ankles would give way without warning. (*Id.*)

In a form completed on August 15, 1999 (R. 189-95), Kirkpatrick stated that on June 7, 1999, she had started training classes for her full-time legal secretary position, but she also stated "sitting, standing, walking are still painful, especially after time periods of 15 minutes to 2-4 hours." (R. 189) She listed the following problems that interfered with her ability to work: pain in her entire body, problems with memory, numbness in the bottoms of her feet, pain in her hip and butt areas, stiffness in her right thumb, and deteriorating hearing and eyes. (R. 190) She stated the pain was continuous, and sharper pain caused

her to become immobile. (*Id.*) She stated she walked six blocks in the morning and in the evening, used an "aerobic rider," and used a treadmill for 20 to 30 minutes, three times a week. (R. 194) She described her average day as follows:

> A usual day would be to get up, curlers out of hair, fix cup mocha or tea, dress, makeup, turn on news, glance at newspaper, straighten comforter on bed, leave for work, park car, walk to work, fix mocha, check mail, work to-do box . . . leave work, walk to garage, drive home, check mail, take off shoes, check for phone messages, decide what for dinner, if anything, get Pepsi, tea or coffee, finish newspaper, maybe do some quilting or go through some boxes or sort through papers or clothes, take shower/bath, decide what and press clothes for next day, go to bed, try to read for a little while, sleep 3-8 hours, often about 4, then read or TV.

(*Id.*)

2. Kirkpatrick's medical history

A detailed chronology of Kirkpatrick's medical history is attached to this opinion as Appendix A. The earliest medical report in the Record is a letter from the University of Iowa Hospitals and Clinics dated May 17, 1996. (R. 290-91) In the letter, John C. VanGilder, M.D., a neurosurgeon, wrote that Kirkpatrick was seen in the clinic about a left parasellar cavernous sinus tumor, with complaints of "difficulty with sleeping, paresthesias in both hands as well as feet." (R. 290) The tumor was first discovered in 1961, in connection with symptoms that developed during a pregnancy, and then resolved postpartum. (*Id.*) The symptoms reappeared during three subsequent pregnancies, and then resolved each time postpartum. (*Id.*)

According to the history taken by Dr. VanGilder, in early 1996, doctors in California, where Kirkpatrick was working, recommended a subtotal removal of the tumor, followed by radiotherapy. (*Id.*) Kirkpatrick obtained a second opinion from the Mayo Clinic, and then sought another opinion from Dr. VanGilder, who concluded that Kirkpatrick had "a left

cavernous meningioma," with "some extension of the tumor superiorly that abuts against the hypothalamic area as well as mesial temporal lobe." (R. 291) He recommended the tumor not be treated, at that time, and advised Kirkpatrick to be rechecked in a year. (*Id.*)

On June 4, 1996, Kirkpatrick saw Wilson T. Asfora, M.D., a neurosurgeon in Sioux Falls, South Dakota, complaining about a dull ache, sometimes associated with sharp pain, around her head. (R. 235-36) Dr. Asfora informed Kirkpatrick of three treatment options: surgical resection; conservative treatment, with surgery only if the tumor enlarged in size; and radiosurgery. (R. 235) Kirkpatrick elected to proceed with surgical resection as soon as possible. (*Id.*)

On June 14, 1996, Dr. Asfora performed a left peritoneal craniotomy and subtotal removal of left parasellar and cavernous sinus meningioma. (R. 197) According to the discharge summary, "a great amount of tumor was taken from the cavernous sinus," but "a small amount of tumor was left behind in view of the excessive bleeding from the cavernous sinus." (R. 197) On the second day after the surgery, Kirkpatrick began experiencing "expressive and receptive aphasia" and double vision. (*Id.*, R. 234) An MRI on June 18, 1996, demonstrated spasms in a blood vessel to the brain, so on June 19, 1996, a balloon angioplasty was performed, resulting in an immediate 75% improvement in her speech. (*Id.*) Her speech continued to improve gradually, and she was released from the hospital on June 24, 1996. (R. 197)

On August 13, 1996, Kirkpatrick was seen by Dr. Asfora for a postoperative exam. (R. 234) Dr. Asfora noted Kirkpatrick's aphasia was "almost imperceptible." (*Id.*) Also, "her extrinsic ocular movements appear[ed] to be intact," although she continued to complain of double vision. (*Id.*) Dr. Asfora suspected, but could not confirm, that Kirkpatrick had "a left fourth nerve palsy." (*Id.*) He referred her to an ophthalmologist, and scheduled her for a follow-up appointment in six months. (*Id.*)

Also on August 13, 1996, Kirkpatrick was seen by Susan F. Assam, M.D. for a surgical followup. (R. 245) According to Dr. Assam, Kirkpatrick "has been at home

independently and is doing quite well." (*Id.*) Kirkpatrick reported she was having "a lot of back pain and [was] getting therapy" at a local hospital twice a week. (*Id.*) Her mood was "somewhat low," mostly related to financial problems. (*Id.*) Dr. Assam did not schedule any further follow-up. (*Id.*)

Also on August 13, 1996, Thomas W. Free, D.O. read an MRI of Kirkpatrick's spine. (R. 230) He noted a mild central disc bulge at T11-T12; very mild disc bulges and very mild effacing of the ventral aspect of the thecal sac at T12-L1 and L2-L3; a mild diffuse disc bulge, greater on the left, associated with bilateral facet hypertrophy; and a narrowing of the lateral recess bilaterally, but greater on the left, at L4-L5. (*Id.*)

On August 15, 1996, Kirkpatrick saw internist Timothy T. O'Shea, M.D. (R. 260-61) Dr. O'Shea noted Kirkpatrick's recent history of a craniotomy, removal of a tumor, back pain, and a large, fixed hiatal hernia, with minimal reflux. (R. 261) He discussed with her that she needed to improve her diet to lose weight. (*Id.*) On examination, he noted an obese abdomen and mild lumbar spine tenderness. (*Id.*) His assessment was that she was doing well post surgery; she was suffering from persistent low-back pain, probably secondary to lumbar spine disc disease; she was suffering from dyspeptic symptoms, probably secondary to obesity; and she had a hiatal hernia and mild reflux symptoms. (R. 260-61) He recommended a TENS unit, diet, and exercise. (R. 261)

Kirkpatrick saw Dr. O'Shea again on September 24, 1996. (R. 260) Kirkpatrick reported she was able to work only a few hours a day before suffering from marked fatigue. (*Id.*) On October 21, 1996, she called Dr. O'Shea's office to report she continued to be tired. (R. 251)

On December 16, 1996, John A. McMeekin, Ed.D., a licensed psychologist, prepared a psychological and intellectual assessment of Kirkpatrick for Disability Determination Services ("DDS"). (R. 209-214) Dr. McMeekin determined Kirkpatrick's full scale IQ was 106, which he described as "solid Average." (R. 211) During the IQ test, Kirkpatrick gave some indications of dysnomia, failing to recall the names of two

common objects. (*Id.*) On the "Wechsler Memory Scale - Revised," she tested as average in all areas except for visual memory, where she tested above average. (R. 212)

Dr. McMeekin concluded Kirkpatrick's memory functions were average or higher, but she had some indications of mild dysnomia. (R. 213) She was "alert, coherent, and relevant without acute distress or decompensation." (*Id.*) He observed she had excellent social skills and a good range of affect. (*Id.*) He found no abnormality, and specifically noted that he saw no major depression. (*Id.*) He rated her GAF as 71.[4] (*Id.*)

On February 11, 1997, Kirkpatrick returned to Dr. Asfora for a surgical follow-up. (R. 233) Dr. Asfora noted the post-operative aphasia had "completely subsided." (*Id.*) However, an MRI of the brain suggested a diagnosis of hydrocephalus. (*Id.*) Dr. Asfora decided placement of a ventricular peritoneal shunt was necessary to address this condition. (*Id.*) Also, Kirkpatrick complained of low back pain, and an MRI of the lumbosacral spine "revealed a disc bulge at the L4-5 level, associated with bilateral facet hypertrophy and narrowing of the lateral recesses bilaterally, greater on the left." (*Id.*) On March 3, 1997, Kirkpatrick underwent surgery to insert a ventricular peritoneal shunt. (R. 215) The procedure was completed without difficulty. (*Id.*)

On March 11, 1997, and again on April 15, 1997, Kirkpatrick saw Dr. O'Shea, complaining of persistent cough and rhinitis. (R. 250-51) He prescribed Claritin for the rhinitis. (R. 250) Dr. O'Shea also diagnosed "generalized myalgias." (*Id.*) On May 27, 1997, Kirkpatrick again was seen by Dr. O'Shea, who observed that the rhinitis had improved. (R. 247) Dr. O'Shea stated the myalgia-type symptoms possibly were "related to underlying spinal disease." (*Id.*)

Also on May 27, 1997, Kirkpatrick had an MRI of the lumbar spine, which showed mild lumbar spondylosis. (R. 226) Later that day, she saw Dr. Asfora, complaining of severe neck pain, left upper limb pain, severe low back pain, and left lower limb pain.

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[4] *See* Appendix at A-9, note 4.

(R. 232) On examination, Dr. Asfora noted Kirkpatrick had multiple trigger points throughout her body. He stated he believed Kirkpatrick "has a fibromyalgia syndrome." (*Id.*) He prescribed an eight-week course of pool therapy, Naprosyn, and amitriptyline. (*Id.*) At Kirkpatrick's request, the doctor also "allowed her to remain off work for an additional two months." (*Id.*)

On July 7, 1997, Kirkpatrick saw P. James Eckhoff, M.D., a specialist in rheumatology, at Central Plains Clinic, for an assessment of possible fibromyalgia. (R. 237-40) On examination, Dr. Eckhoff found 18 out of 18 potential fibromyalgia tender points. (R. 239) He concluded, "It certainly would appear that Ms. Kirkpatrick has fibromyalgia," although he noted, "[I]t does not appear that she has a significant inflammatory joint process at this time." (*Id.*) He prescribed exercise, including a regular walking program. (R. 240)

On August 6, 1997, Kirkpatrick saw Dr. O'Shea, who concurred in the diagnosis of fibromyalgia. (R. 246) On October 3, 1997, Dr. O'Shea completed a "fibromyalgia residual functional capacity questionnaire" for Kirkpatrick (R. 325-28), and concluded she met the American Rheumatological criteria for fibromyalgia. (R. 325) He concluded she was not a malingerer (R. 326), emotional factors did not contribute to her symptoms (*id.*), her impairments had lasted or could be expected to last at least 12 months (R. 325), and her condition would require her to be absent from work more than four times a month (R. 328).

On December 18, 1997, and January 21, 1998, Kirkpatrick was seen by David Archer, M.D., upon referral from DDS. On January 12, 1998, Dr. Archer prepared a "fibromyalgia residual functional capacity questionnaire" for Kirkpatrick. (R. 270-75) He also concluded Kirkpatrick met the American Rheumatological criteria for fibromyalgia. (R. 270) He concluded she was not a malingerer (R. 271), emotional factors did not contribute to her symptoms (*id.*), her impairments lasted or could be expected to last at least 12 months (R. 270), and her condition would require her to be absent from work about four times a month (R. 274).

On March 20, 1998, Dennis A. Weis, M.D. completed a Physical Residual Functional Capacity Assessment for DDS. (R. 292-300) He determined Kirkpatrick could occasionally lift 10 pounds and frequently lift less than 10 pounds. She could stand and/or walk at least two hours in an eight-hour workday. She could sit, with normal breaks, about six hours in an eight-hour workday. She had no limitations on her ability to push or pull. She also had no manipulative, visual, communicative, or environmental limitations. She should never climb ladders, ropes, or scaffolds, and should not crawl, but occasionally she could balance, stoop, kneel, and crouch. Dr. Weis concluded Kirkpatrick "should be capable of RFC as outlined." (R. 300)

On April 23, 1998, Kirkpatrick saw Dr. Archer about her fibromyalgia, but stated she could not afford to pay for treatment. (R. 266) Dr. Archer gave her samples of Prozac and Relafen, and a prescription for generic Trazodone. (*Id.*) Kirkpatrick saw Dr. Archer again on May 7, 1998, for a follow-up, and he gave her a refill of Prozac and Trazodone. (*Id.*) Kirkpatrick advised that these medications seemed to be helping. (*Id.*)

On July 24, 1998, Philip J. Muller, D.O., a psychiatrist, completed a disability evaluation for DDS. (R. 278-80) Dr. Muller concluded Kirkpatrick suffered from a major depressive disorder. He stated she would have difficulty remembering and understanding instructions, procedures, and locations. (R. 280) She also would have difficulty maintaining attention, concentration, and pace. (*Id.*) She would have some limited difficulty in interacting appropriately with supervisors, coworkers, and the public. (*Id.*) She likely would have reasonable judgment, but her depression might affect her ability to respond appropriately to changes. (*Id.*)

On October 12, 1998, Gary J. Cromer, M.D. completed a Residual Physical Functional Capacity Assessment of Kirkpatrick for DDS that was identical to the assessment prepared by Dr. Weis on March 20, 1998. (R. 301-308) In a report accompanying his assessment, Dr. Cromer concluded Kirkpatrick's subjective reports "reveal numerous inconsistencies." (R. 309) He noted she had "been noncompliant with

prescribed therapy in the past and [had] not followed up with her treating rheumatologist as instructed." (*Id.*)

Also on October 12, 1998, Philip R. Laughlin, Ph.D. completed a Psychiatric Review Technique form for Kirkpatrick. (R. 310-18) He concluded she had no severe medical impairments and no mental health problems, except for a depressive syndrome that could cause sleep disturbance, psychomotor agitation or retardation, decreased energy, and difficulty concentrating or thinking. He found these problems resulted in only a slight degree of limitation. (R. 317)

On January 25, 1999, Kirkpatrick saw Dr. Archer with complaints she believed were related to fibromyalgia. (R. 330) He noted the history she was providing was "vague and circuitous," and she tended to "side step direct questioning." (*Id.*) However, because he was concerned about the aftermath of her brain surgery, Dr. Archer referred her back to Dr. VanGilder at the University of Iowa Hospitals and Clinics. Dr. VanGilder found no residual problems from the brain surgery, and concluded Kirkpatrick suffered from "multiple myalgias . . . secondary to fibromyalgia." (R. 289)

3. Vocational Expert's Testimony

The ALJ asked the VE about someone who has worked as a baker helper, paralegal, and secretary. (R. 79) The ALJ asked the VE to assume the person was 51 years old, and to further assume the individual had

> the ability to lift or carry on a frequent or occasional basis, 10 pounds; to stand or walk with normal breaks for 2 hours out of an 8 hour day; to sit with normal breaks for 6 hours out of an 8 hour work day; to do postural activities on an occasional basis. I'm referring to climbing, balancing, stooping, kneeling, crouching, crawling. Not to be working with ropes, ladders and scaffolds. No limitations in manipulation, visual, communications or environmental.

(R. 79) The VE responded this person would be able to perform Kirkpatrick's past work as a legal secretary, which is classified as "sedentary," but not the paralegal or baker helper jobs. (R. 79-80) The VE also testified that if Kirkpatrick's testimony were credible, she would not have been able to return to the legal secretary position during the closed period because "her hands would fall asleep after a short period of time," and she could only perform household activities for about a five-minute period before she would have to sit down and rest. (R. 80-81)

On cross-examination by Kirkpatrick's representative, the VE testified the individual in the ALJ's hypothetical would not be able to perform the legal secretary job if the individual also had difficulty remembering, understanding, and carrying out instructions, and maintaining attention, concentration, and pace. (R. 81)

4. The ALJ's conclusions

The ALJ first concluded that, prior to her current employment as a legal secretary, Kirkpatrick had last engaged in substantial gainful activity ("SGA") when she worked as a paralegal in California. (R. 24) The ALJ reached this conclusion after finding that Kirkpatrick's jobs as a babysitter, baker, and disc jockey did not represent SGA. (R. 24-25) The ALJ further concluded the evidence supported a finding that Kirkpatrick had "fibromyalgia and mild lumbar spondylosis, impairments which cause more than minimal restrictions in the ability to perform basic work activity" (R. 25); however, her impairments were not severe enough to meet or medically equal one of the impairments listed in the Regulations. (R. 29-30) The ALJ noted that while Kirkpatrick's status post neurosurgery brain resection "was certainly a severe impairment, . . . it did not meet the durational requirement of a 12 month disability period." (R. 26) The ALJ found Kirkpatrick was "asymptomatic and [had] no continuing neurological deficits stemming from her parasellar tumor and meningioma." (R. 33) The ALJ also found Kirkpatrick's symptoms of

depression did not constitute a severe impairment, and "there is no evidence that her activities of daily living have been adversely affected by any mental impairment." (*Id.*)

After summarizing the applicable regulations, citing *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984), and discussing some of the medical evidence in the Record, the ALJ concluded Kirkpatrick's "statements concerning her impairments and their impact on her ability to work are not entirely credible." (R. 32) The ALJ stated, "[T]he severity of the claimant's impairments as she has described them is not supported by the medical evidence of record." (*Id.*)

The ALJ made the following specific findings: "Based on the claimant's testimony, her work activity, the medical evidence of record, and the opinions of the state agency experts, . . . the claimant retains the residual functional capacity to occasionally lift 10 pounds, to sit 6 hours in an 8 hour day, to stand and/or walk 2 hours in an 8 hour day, and to occasionally climb, balance, stoop, kneel, crouch, and crawl She should never climb ladders or scaffolds." (R. 33)

The ALJ found Kirkpatrick "has had the capacity to perform her past relevant work as a legal secretary throughout the period of alleged disability. Furthermore, she has had the physical and mental capacity for essentially the full range of unskilled sedentary work." (*Id.*) Based on these findings, the ALJ concluded Kirkpatrick was not under a disability as defined in the Social Security Act throughout the period of alleged disability, and therefore held she is not entitled to DI or SSI benefits. (R. 34)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can

be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)).

Step five requires that the Commissioner bear the burden on two particular matters:

> In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added); *accord Weiler v. Apfel*, 179 F.3d 1107, 1110 (8th Cir. 1999) (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra*, 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra*, 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be

conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell, id.; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does "not reweigh the evidence or review the factual record *de novo.*" *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier*, 294 F.3d at

1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); *accord Pearsall*, 274 F.3d at 1217; *Gowell*, *supra*.

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

As noted previously, Kirkpatrick argues the ALJ erred in several respects, with the result that the Record does not contain substantial evidence to support the denial of benefits. The court finds dispositive Kirkpatrick's argument that the ALJ incorrectly relied on the opinions of non-examining, non-treating physicians working for DDS, and improperly discredited or ignored the opinions of Kirkpatrick's treating physicians.

"A treating physician's opinion should not ordinarily be disregarded and is entitled to substantial weight. *Ghant v. Bowen*, 930 F.2d 633, 639 (8th Cir. 1991). By contrast, '[t]he opinion of a consulting physician who examines a claimant once or not at all does not generally constitute substantial evidence.' *Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998)." *Jenkins v. Apfel*, 196 F.3d 922, 925 (8th Cir. 1999).

In *Prosch v. Apfel*, 201 F.3d 1010 (8th Cir. 2000), the Eighth Circuit Court of Appeals discussed the weight to be given to the opinions of treating physicians:

> The opinion of a treating physician is accorded special deference under the social security regulations. The regulations provide that a treating physician's opinion regarding an applicant's impairment will be granted "controlling weight," provided the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(d)(2). Consistent with the regulations, we have stated that a treating physician's opinion is "normally entitled to great weight," *Rankin v. Apfel*, 195 F.3d 427, 430 (8th Cir. 1999), but we have also cautioned that such an opinion "do[es] not automatically control, since the record must be evaluated as a whole." *Bentley v. Shalala*, 52 F.3d 784, 785-86 (8th Cir. 1995). Accordingly, we have upheld an ALJ's decision to discount or even disregard the opinion of a treating physician where other medical assessments "are supported by better or more thorough medical evidence," *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997), or where a treating physician renders inconsistent opinions that

> undermine the credibility of such opinions, *see Cruze v. Chater*, 85 F.3d 1320, 1324-25 (8th Cir. 1996).
>
> Whether the ALJ grants a treating physician's opinion substantial or little weight, the regulations provide that the ALJ must "always give good reasons" for the particular weight given to a treating physician's evaluation. 20 C.F.R. § 404.1527(d)(2); *see also* SSR 96-2p.

Prosch, 201 F.3d at 1012-13. *See Wiekamp v. Apfel*, 116 F. Supp. 2d 1056, 1063-64 (N.D. Iowa 2000). *See also Rankin v. Apfel*, 195 F.3d 427, 429 (8th Cir. 1999) (where physician's conclusion is based heavily on claimant's subjective complaints and is at odds with the weight of objective evidence, ALJ need not give physician's opinion the same degree of deference) (citing *Haggard v. Apfel*, 175 F.3d 591, 595 (8th Cir. 1999)).

The medical record in this case is relatively consistent and straightforward. On April 1, 1996, Kirkpatrick left her job in California, to seek treatment for a large, invasive brain tumor. On June 14, 1996, Dr. Asfora performed surgery to remove most of the tumor. Shortly after the surgery, Kirkpatrick suffered from aphasia and double vision. An emergency balloon angioplasty was performed, and her speech immediately began to improve. In a post-operative visit with Dr. Assam on August 13, 1996, Kirkpatrick appeared to be recovering well from the surgery, but she was suffering from severe back pain and was exhibiting some symptoms of depression. An MRI revealed some minor back problems.

Beginning on August 15, 1996, Kirkpatrick began seeing an internist, Dr. O'Shea. Over several visits, she reported to Dr. O'Shea continuing problems with back pain and marked fatigue. On December 16, 1996, Dr. McMeekin, a psychologist, prepared a psychological and intellectual assessment of Kirkpatrick for DDS. Dr. McMeekin determined Kirkpatrick's mental functioning was at least average in all areas, except for indications of mild dysnomia. He observed no major depression.

On February 11, 1997, Kirkpatrick saw Dr. Asfora for a surgical follow-up. Kirkpatrick complained of low back pain, and an MRI revealed a disc bulge at L4-5. The post-operative aphasia had resolved, but an MRI indicated Kirkpatrick was suffering from hydrocephalus, so on March 3, 1997, Dr. Asfora performed a surgery to place a ventricular peritoneal shunt.

After placement of the shunt, Kirkpatrick saw Dr. O'Shea several times with persistent, generalized complaints, which he described as "generalized myalgias." On May 27, 1997, Dr. Asfora discovered Kirkpatrick had multiple trigger points throughout her body, and concluded she had "a fibromyalgia syndrome." At that point, he had not yet released her to work, and at her request, he "allowed her to remain off work for an additional two months."

On July 7, 1997, Kirkpatrick saw Dr. Eckhoff, a specialist in rheumatology, who found Kirkpatrick had 18 out of 18 potential fibromyalgia tender points. He diagnosed her as suffering from fibromyalgia, without significant inflammatory joint process at that time. On August 6, 1997, Dr. O'Shea concurred in the diagnoses of Drs. Asfora and Eckhoff that Kirkpatrick suffered from fibromyalgia. He concluded Kirkpatrick was not a malingerer, her impairments lasted or could be expected to last at least 12 months, and her condition would require her to be absent from work more than four times a month. On January 12, 1998, Dr. Archer issued a report in which he essentially agreed with Dr. O'Shea's conclusions. On April 23, 1998, Kirkpatrick saw Dr. Archer for treatment of her fibromyalgia, but she was not able to pay for his services or prescriptions to treat her condition. Dr. Archer gave her some prescription samples, which helped treat her symptoms.

On July 24, 1998, Dr. Muller, a psychiatrist, completed a disability evaluation for DDS, finding Kirkpatrick was suffering from a major depressive disorder.

In January 1999, Dr. Archer referred Kirkpatrick to Dr. VanGilder, a neurosurgeon at the University of Iowa, who saw Kirkpatrick on February 9, 1999. Dr. VanGilder found

no residual effects from the brain surgery, but concluded Kirkpatrick suffered from "multiple myalgias . . . secondary to fibromyalgia."

The ALJ essentially ignored this extensive and overwhelming evidence,[5] which establishes that Kirkpatrick was unable to work from April 1, 1996, to sometime after February 9, 1999.[6] Instead, the ALJ relied on evidence from three non-treating, non-examining physicians who prepared reports for DDS. Particularly in light of contrary evidence from Kirkpatrick's treating physicians, the opinions of these consulting physicians cannot constitute substantial evidence to support the ALJ's denial of benefits. *See Jenkins*, 196 F.3d at 925 (citing *Kelley*, 133 F.3d at 589).

The court finds substantial evidence exists in the Record to find Kirkpatrick was disabled during the period in question.

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[5]The ALJ stated she gave Dr. O'Shea's opinion "little weight" because "there is no support in his treatment notes for the degree of limitation in the claimant's capacity for work related activity." (R. 27) This is not an adequate justification to ignore the opinions of a treating physician, particularly when those opinions are directly in line with another treating physician (Dr. Archer), and are consistent with numerous other treating and examining physicians, including Dr. Asfora, Dr. Eckhoff, and Dr. VanGilder.

[6]She successfully returned to full-time employment on June 1, 1999.

V. CONCLUSION

Having found Kirkpatrick is entitled to benefits for the closed period, the court may affirm, modify, or reverse the Commissioner's decision with or without remand to the Commissioner for a rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen,* 833 F.2d 124, 127-28 (8th Cir. 1987)); *accord Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits).

Accordingly, for the reasons discussed above, the Commissioner's decision is **reversed**, and this case is **remanded** to the Commissioner to calculate and award benefits for the closed period.[7]

IT IS SO ORDERED.

DATED this 18th day of June, 2003.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[7] Plaintiff's counsel is directed to submit a timely application for attorney fees in accordance with Local Rule 54.2(b).